

STATE OF MICHIGAN
IN THE SUPREME COURT

GREGORY HAYNES,

Plaintiff-Appellant,

v

OAKWOOD HEALTHCARE, INC., a Michigan corporation,
OAKWOOD HOSPITAL-SEAWAY CENTER,
jointly and severally.

Defendant-Appellees.

and,

MICHAEL J. NESHEWAT,

Defendant,

S.C. No. 129206

COA No. 249848

LC No. 01-137330-NO

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PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

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| <i>ORAL ARGUMENT REQUESTED</i> |
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BASIS OF APPELLATE JURISDICTION

The Court has Jurisdiction of this appeal under MCR 7.302.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Public Accommodation Section of Elliott-Larsen which protects full and equal enjoyment of goods, service, facilities, privileges and accommodation, as it relates to a hospital, is limited to persons seeking medical care?

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| Appellee says: | NO |
| Court of Appeal says: | NO |
| Appellant says: | YES |

STANDARD OF REVIEW

The standard of review of a denial of a motion for summary disposition is *de novo*. This appeal also involves the interpretation of statutory language which is a question of law and which is also reviewed *de novo*.

A motion for summary disposition pursuant to MCR 2.116(C)(8) is tested by the pleadings alone, with all factual allegations taken as true. Atkinson v. Farley, 171 Mich App 784, 786, 431 NW2d 95, 96 (1988). The motion must be denied unless the alleged claims are so clearly unenforceable as matter of law that no factual development could possibly justify a right to recovery. Velmer v. Baraga Area Schools, 157 Mich App 489, 495, 403 NW2d 171 (1987), lv gtd 428 Mich 910, 409 NW2d 199 (1987).

I. STATEMENT OF FACTS

A. PROCEDURAL HISTORY

The Plaintiff filed his four count complaint in this case on October 31, 2001. Default was entered against Defendant NESHEWAT for failure to appear or plead on June 5, 2002. The Plaintiff filed a motion for default judgment on December 20, 2002. While Defendant NESHEWAT was still in default and a motion for default judgment was pending, on January 7, 2003, Defendant OAKWOOD filed a motion for summary disposition. Defendant NESHEWAT filed a motion to set aside the default on January 17, 2003.

A hearing was held and on June 4, 2003 the Court entered an order ***Denying in Part and Granting in Part Defendant's Motion for Summary; Granting Plaintiff's Motion for Entry of Default Judgment; And Denying Defendant's Motion to Set Aside Default***. Defendant NESHEWAT did not appeal either the order denying default or the default judgment and hence he is not a party to this appeal.

Defendant OAKWOOD filed for reconsideration of the Court's June 4, 2003 order granting in part and denying in part Defendant OAKWOOD's motion for summary disposition. The trial Court denied Defendant's motion for reconsideration by order dated June 27, 2003. Defendant OAKWOOD appealed that order.

On January 28, 2004, the parties stipulated to stay proceedings pending appeal and the Court so ordered. The Court of Appeal issued a per curium opinion dismissing the Plaintiff's case with Judge Griffin dissenting. Plaintiff filed this Application for Leave which this Court granted on January 10, 2006.

B. FACTUAL BACKGROUND

The Plaintiff is a physician licensed in the state of Michigan. (Appendix, p.34A, Complaint paragraph 8) He has dedicated his internal medicine practice to treating patients in the Downriver area. (Appendix, p.34A, Complaint paragraph 8) Due to his specialty in internal medicine and gastroenterology, the Plaintiff's practice is particularly dependent upon referrals by patients and other physicians in the Downriver area. (Appendix, p.34A, Complaint paragraph 9) In order to care for and follow patients requiring hospitalization, Dr. HAYNES, since approximately 1991, has maintained, and still maintains, medical staff membership and clinical privileges at Oakwood-Seaway Center, i.e., Oakwood.¹(Appendix, p. 22A, Complaint paragraph 10) The Plaintiff also has staff privileges at Heritage, Sinai-Grace, Harper and Hutzel Hospitals but the vast majority of his practice in the downriver area was handled through Oakwood. (Appendix, p. 22A, Plaintiff's Brief in Opposition to Defendant's Motion for Summary disposition, Exhibit 1).

As primary care physicians commonly do, Dr. HAYNES provided attending physician services to his hospitalized patients and also made arrangements with other physicians, including Dr. Oscar Linares, to provide such attending physician services. (Appendix, p. 34A, Complaint paragraph 11) Dr. Linares, a cardiologist, referred many patients to Dr. HAYNES for internal medicine related care. The arrangement between Dr. HAYNES and Dr. Linares was a reciprocal and economically advantageous relationship to both physicians and was well known to the Defendants. (Appendix, p. 34A, Complaint

¹ Contrary to the Trial Court's characterization that the Plaintiff "contests the termination of his privileges" (*See Appendix, p. a, 6/4/03 Opinion.*), the Plaintiff never lost his privileges at the Defendant hospital. The Plaintiff complains of the racial discrimination which affected his private practice and his use of the facilities at the hospital.

paragraph 12) At times, Dr. Linares made arrangements for Dr. HAYNES to provide attending physician services to his patients hospitalized at Oakwood. (Appendix, p. 35A, Complaint paragraph 13) Dr. HAYNES also provided Gastroenterology consultation services to patients for Dr. Linares. (Appendix, p. 35A, Complaint paragraph 13)

Dr. HAYNES is an African American and, to his knowledge, is the only African American physician on staff who conducts the majority of his hospital practice at Oakwood.(Appendix, p. 35A, Complaint paragraph 15)

The Plaintiff had successful and beneficial relationships with his patients and other physicians, including Dr. Linares, who referred patients to him. (Appendix, p. 35A, Complaint paragraph 16) The Defendants knew that the Plaintiff had such relationships and that the Plaintiff had a valid and legitimate expectancy of continuing such relationships to his economic advantage. (Appendix, p. 35A, Complaint paragraph 18)

Defendant NESHEWAT threatened, on several occasions, to penalize Dr. Linares professionally unless he stopped referring patients to the Plaintiff and instead started referring such patients to him and his partner. (Appendix, p. 37A, Complaint paragraph 29) Dr. NESHEWAT was Chief of Staff at Oakwood and his independent practice was in the field of internal medicine, the same as the Plaintiff. (Appendix, p. 33A, Complaint paragraph 4) Dr. Yassir Attalla was Chief of Medicine at Oakwood and his field of practice was also internal medicine. In addition to being chief of staff and chief of medicine, respectively at Oakwood Seaway, Dr. NESHEWAT and Dr. Attalla were also partners in private practice in the Downriver area and competed with the Plaintiff professionally in the same geographic area. (Appendix, p. 27A-30A, Plaintiff's Brief in Opposition to Defendant's Motion for Summary disposition, Exhibit 3, pp. 10-13 and Exhibit 4).

Although Dr. Linares initially resisted the threats, he later yielded after it became clear to him that Dr. NESHEWAT intended to make good on his threats. (Appendix, p. 37A, Complaint paragraph 30) Dr. Linares, told the Plaintiff that out of concern for his own economic interests and based upon the threats and actions by Dr. NESHEWAT, Dr. Attalla and others, he was compelled to drastically reduce and then stop all together his referral of patients to the Plaintiff for treatment at Oakwood. (Appendix, p. 37A, Complaint paragraph 30) The loss of these referrals had a detrimental impact upon the Plaintiff's income derived from treating patients at Oakwood. (Appendix, p. 24A, 37A, Complaint paragraph 31; Plaintiff's Brief in Opposition to Defendant's Motion for Summary disposition, Exhibit 2).

The Plaintiff is not challenging the peer review process. The Plaintiff challenged the discriminatory plan and scheme of Defendants NESHEWAT and OAKWOOD to impair his private practice by impairing his use of the hospital facilities through intimidation of referring physicians, disparaging his professional competence to his colleagues (outside of any peer review process), attempting to steal patients from his private practice and using administrative procedures in a manner to enforce threats previously made. (Appendix, p. 35A, Complaint paragraph 20-25) The Plaintiff filed suit while the administrative hearings were in their early stages. The Plaintiff fully participated in the peer review process and never attempted to thwart or impede it. In his complaint the Plaintiff did not seek an injunction or any intervention by the Court into the peer review process and he never sought any remedy that would in any way nullify or impair any resultant action to be taken by the hospital's administration. The Plaintiff never challenged any action under the

Appellee's by-laws, he never challenged the by-laws themselves, and, in fact, the Plaintiff's complaint never even mentions "by-laws."

The Plaintiff filed his complaint alleging, in four counts, violation of Elliott Larsen Civil Rights Act; tortious interference with business relationships and expectancies (as to Defendant NESHEWAT only); negligence and conspiracy. (See Appendix, p. 32A, Complaint.) During discovery, the Plaintiff voluntarily dismissed two (2) of the originally named individual Defendants from the lawsuit, i.e., Mr. Brian Peltz and Dr. Robert J. Murray. (See Appendix, p. 2A, Docket Sheet.) It became clear after his deposition that Mr. Peltz's involvement was incidental and he was therefore dismissed. Dr. Murray was dismissed based upon representations of defense counsel that he was in very poor and precarious health.² (See Appendix, p. 2A, Docket Sheet.) Defendant NESHEWAT was defaulted and default judgment has been entered against him. (See Appendix, p. 2A, Docket Sheet.) Defendant NESHEWAT has not appealed either decision.

Defendant OAKWOOD appealed the denial of summary disposition as to the Plaintiff's ELCRA claims and denial of its motion for reconsideration to the Michigan Court of Appeals. (See Appendix, p. 3A, Docket Sheet.) In a per curium decision, the Court of Appeals reversed the Trial Court and granted Summary Disposition to Defendants-Appellees. (See Appendix, p. 3A, 125A, Court of Appeals Decision.)

² The parties stipulated that Dr. Murray would not be called as a witness for the defense.

C. THE COURT OF APPEALS' DECISION

1. THE PER CURIUM OPINION

The per curium opinion held that the terms, “goods, services, facilities, privileges, advantages or accommodations” should be construed the same way in the CRA’s MCL 37.2302(a) as in CRA’s MCL 37.2301 (a). (See Appendix, p. 128A, Court of Appeals Decision.) CRA MCL 37.2301 (a)’s language restricts “goods, services, facilities, privileges, advantages or accommodations” to those “extended, sold or otherwise made available to the public.” Therefore, CRA MCL 37.2302 (a) should have the same restriction read into its language, even though that restriction isn’t specifically in MCL 37.2302 (a). (See Appendix, p. 128A, Court of Appeals Decision.)

The per curium opinion also held that the CRA contemplates that an institution may be public in some respects while private in others. (See Appendix, p. 128A, Court of Appeals Decision.) The per curium held that a MCL 37.2302 (a) claim requires consideration of whether a Plaintiff has alleged denial of **access** to “goods, services, facilities, privileges, advantages, or accommodations” that were “otherwise made available to the public.” (See Appendix, p. 129A, Court of Appeals Decision.) The per curium held that Plaintiff did not and could not plead denial of access. Thus, the per curium opinion reversed the Trial Court’s denial of Summary Disposition. (See Appendix, p. 130A, Court of Appeals Decision.)

2. JUDGE GRIFFIN’S DISSENT

Judge Griffin wrote a dissent from the per curium opinion. First, Judge Griffin laid out the well-established rules of statutory construction:

1. The fundamental task of statutory construction is to discover and give effect to the intent of the Legislature.

2. The task of discerning our Legislature's intent begins by examining the language of the statute itself.
3. Where the language of the statute is unambiguous, the plain meaning reflects the Legislature's intent and this Court applies the statute as written. Judicial construction under such circumstances is not permitted.
4. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to determine legislative intent.
5. When construing a statute, the court must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory.
6. If possible, effect should be given to each provision.

(See Appendix, p. 132A, Court of Appeals Decision.)

Citing Whitman v. Mercy-Memorial Hospital, 128 Mich App 155, 339 NW2d 882 (1994), Judge Griffin held that Defendants' Oakwood Hospital is a place of public accommodation and thus subject to the prohibited discrimination practices of MCL 37.2302(a). (See Appendix, p. 132A, Court of Appeals Decision.)

Judge Griffin then analyzed the first issue, whether hospital staff privileges constitute "goods, services, facilities, *privileges*, *advantages*, or accommodations" under the plain meaning of the words. Griffin looked at dictionary definitions of the words. He found the dictionary definition of "privilege" to be:

a right, immunity or benefit enjoyed by a particular person or a restricted group of persons.

Random House Webster's College Dictionary, 2nd Ed.

The dictionary definition of "advantage" is:

any circumstance, opportunity or means specially favorable to success or a desired end.

Random House Webster's College Dictionary, 2nd Ed.

Based on the dictionary definitions of “privileges” and “advantages”, Judge Griffin found that clinical staff privileges fall within those definitions. (See Appendix, p. 133A, Court of Appeals Decision.)

The pivotal question, however, as set forth by Judge Griffin was whether the CRA prohibits places of public accommodation from unlawfully discriminating against individuals or only members of the public. (See Appendix, p. 133A, Court of Appeals Decision.) Griffin found that the plain language of § 2302 (a) protects the rights of the individual:

Except where permitted by law, a person shall not:

(a) Deny an **individual** the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status. [emphasis added]

MCL 37.2302 (a)

Based on the plain language of an unambiguous CRA statute, Judge Griffin would have affirmed the Trial Court opinion. (See Appendix, p. 135A, Court of Appeals Decision.)

II. ARGUMENT

A. SUMMARY OF ARGUMENT

This appeal arises under the Public Accommodation Section of the Elliott-Larsen Civil Rights Act. MCL 37.2301 et. seq. The question presented here is whether the Plaintiff, a physician with staff privileges but not an employee of the Defendant hospital, can maintain an action against the hospital alleging denial of the full and equal enjoyment of the facilities and privileges of a place of public accommodation based upon racial discrimination. The Plaintiff has found no controlling law that addresses the precise issue presented in this case.

This is not an employment case where reversal or modification of an adverse employment action is the objective. This is not a case where a doctor is challenging the legitimacy of any administrative decision or the fairness of a hospital's by-law procedures.³ This is a case of naked and raw racial discrimination, coupled with greed, by unprincipled agents of the Defendant hospital acting for their own personal gain but using the power and authority of their hospital positions to effect extortion and intimidation.

The CRA is unambiguous as to the language in Article 3, and, thus, the Court of Appeals committed error when it added a new **access** requirement, not found in the CRA. Further, the plain language of the CRA makes it clear that Defendants' Oakwood Hospital is a "public accommodation" and subject to the CRA; the plain language of the CRA and dictionary definitions make clear that Plaintiff's staff privileges falls within the definitions of "privileges" and/or "advantages" and under protections of the CRA; thus, Plaintiff has properly pled an Article 3 claim under the CRA.

The intent of the legislature in enacting the Civil Rights Act (CRA), was to prevent discrimination based on a person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. Noecker v. Department of Corrections, 203 Mich.App 43, 46; 512 NW2d 44 (1993). The CRA is remedial and must be liberally construed to effectuate its ends. Reed v Michigan Metro Girl Scout Council, 201 Mich.App 10, 15; 506 NW2d 231 (1993).

³The Appellee devoted three (3) pages of its Court of Appeals brief outlining its by-laws and administrative procedures. These procedures are not germane to the Plaintiff's claims and not a single argument in the Appellee's Court of Appeals brief relates to them.

B. PLAINTIFF ALLEGED SUFFICIENT FACTS TO STATE A CLAIM UNDER THE PUBLIC ACCOMMODATION SECTION OF ELLIOT LARSEN (CRA).

The Plaintiff alleged, in his complaint, that, inter alia: he is an African-American; he is a licensed physician; he had, and still has, staff privileges at Oakwood Hospital; he is the only African-American physician conducting the majority of his business at Oakwood; he is a member of a class entitled to protection under Elliott-Larsen; Oakwood is a place of public accommodation; the Defendants deprived him of the ability and opportunity to fully and equally utilize the facilities of Oakwood; all of the discriminatory actions of the Defendants were outside the scope of any privilege; the Defendants breached their duty not to discriminate against him based on race and proximately caused his damages; the Defendants and others conspired to violate Elliott-Larsen. (Appendix, p.33Aff, Complaint ¶¶ 1, 8, 10, 15, 17, 18, 19, 24, 33, 34, and 36).

These allegations sufficiently state a claim for racial discrimination under the Public Accommodation Section of Elliott-Larsen. MCL 37.2302(a).

C. THE COURT OF APPEALS PER CURIAM IGNORED THE PLAIN LANGUAGE OF THE ELLIOT-LARSEN CIVIL RIGHTS ACT (CRA)

MCL 37.2301 sets forth the definitions to be used Article 3 of the Elliott-Larsen CRA, Public Accommodations and Services. It states:

Sec. 301. As used in this article:

(a) "Place of Public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold or otherwise made available to the public.

MCL 37.2301 (a)

The Court of Appeals per curium opinion held that whether a cause of action has been properly pled under MCL 37.2302(a) does not depend **solely** on whether the entity might fit the definition of “place of public accommodation” as set forth in MCL 37.2301(a). (See Appendix, p. 129A, Court of Appeals Decision.) In addition, a plaintiff must also allege “that he was denied **access** to goods, services, facilities, privileges, advantages, or accommodations that were ‘otherwise made available to the public’[emphasis added].” (See Appendix, p. 129A, Court of Appeals Decision.)

This **access** requirement added to the state’s CRA statute is new. In fact, the word “access” does not even appear in the statute, nor does any synonym. Although the word “access” has appeared in some prior court opinions on the CRA,⁴ several Michigan appellate courts have rejected use of the word “access” as a synonym for “full and equal enjoyment.” See, e.g., Clarke v. K-Mart Corp., 197 Mich App 541, 495 NW2d 820 (1993) app. den. 443 Mich 862, 505 NW2d 581 (1993); Wells v. County of Bay, 2006 WL 141675 (Mich.App.).

A variety of Michigan Appellate cases have noted that the “full and equal enjoyment” language found in the Elliott-Larsen CRA (as well as in the Persons with Disabilities Civil Rights Act [PWDCRA]) can, in various factual situations, mean something considerably different from “access.” See, e.g., Bertrand v. City of Mackinac Island, 256 Mich App 13, 662 NW2d 77 (2003); Cabreco v. Music Hall, 219 Mich App 353, 555 NW2d 862 (1996); Clarke v. K-Mart Corp., 197 Mich App 541, 495 NW2d 820 (1993) app. den. 443 Mich 862, 505 NW2d 581 (1993); Wells v. County of Bay, 2006 WL 141675 (Mich.App.).

⁴Most notably, Kassab v. Michigan Basic Prop Ins Ass’n, 441 Mich 433, 491 NW2d 545 (1992) used the word in dicta. (See, Judge Griffin’s dissent, Appendix, p. 134A, Court of Appeals Decision.)

Because the per curium opinion used “access” as a synonym for “full and equal enjoyment”, it violated the basic meaning of the words. Because the per curium opinion has added language to an unambiguous statute, it violated one of the basic standards of statutory interpretation. Thus, the Court of Appeals per curium opinion goes against the basic meaning of words, in addition to basic statutory interpretation. As a consequence, this Court should reject the per curium opinion’s new **access** requirement for Elliott-Larsen CRA public accommodation cases.

D. THE RULES OF STATUTORY CONSTRUCTION SUPPORT THE PLAINTIFF’S CLAIMS UNDER THE PUBLIC ACCOMMODATION SECTION .

The question presented in this appeal is whether the Plaintiff’s claims may be brought under the public accommodation section. This requires the Court to consider the statutory language of the ELCRA’s Public Accommodation Section. When considering statutory language, the Courts must abide by the well- established rules of statutory construction. Elezovic v. Ford Motor Co., 472 Mich App 408, 697 NW2d 851 (2005).

The Public Accommodation sections of the ELCRA are found at MCL 37.2301 - 37.2304. MCL 37.2301 defines terms to be used in Article 3 of the Act, Public Accommodations and Services. MCL 37.2302 sets forth the prohibited practices under the article. MCL 37.2302(a) deals specifically with “private clubs” which were deemed places of public accommodation in the definition section. MCL 37.2303 expressly specifies exemptions for certain “private clubs.” MCL 37.2304 addresses places of public accommodations holding liquor licenses.

The two sections primarily involved in this appeal are MCL 37.2301 which defines “place of public accommodation” and MCL 37.2302 which sets forth the conduct prohibited by places of Public Accommodations Section under the Act.

MCL 37.2301 Definitions states:

As used in this article:

- (a) ***"Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.*** Place of public accommodation also includes the facilities of the following private clubs:
- (i) A country club or golf club.
 - (ii) A boating or yachting club.
 - (iii) A sports or athletic club.
 - (iv) A dining club, except a dining club that in good faith limits its membership to the members of a particular religion for the purpose of furthering the teachings or principles of that religion and not for the purpose of excluding individuals of a particular gender, race, or color. [emphasis added] MCL 37.2301

There can be no reasonable doubt that Defendant OAKWOOD Hospital qualifies as a place of public accommodation under several categories listed in MCL 37.2301(a), i.e., a business, health facility, or institution of any kind because the hospital’s goods, services, facilities, privileges, and accommodations are offered to the public. There is no ambiguity in this statute with respect to who is subject to the statute when the plain language of the statute is given its ordinary meaning.

The language of MCL 37.2301 makes no general exceptions to the definition of which entities are places of public accommodation. It is significant, however, that MCL 37.2301(a)(iv) makes an express, narrowly drawn, exception based upon religion but only for dining clubs and MCL 37.2303 spells out other specific “exemptions for private clubs.”

The presence of these exemptions is important because it clearly shows that the legislature knew how to grant exemptions and that the legislature did, in fact, grant the exemptions it wished to grant. Since the legislature granted only a few specific and narrow exemptions it is reasonable to conclude that the legislature intended no others.

An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that Courts are to effect the intent of the Legislature. To do so, we begin with an examination of the language of the statute. If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written.

Jager v. Nationwide Truck Brokers, Inc., 252 Mich. App. 464, 652 NW2d 503, 514 (2002), overruled in part by Elozovic, *supra*.

The language of this statute is clear and unambiguous. Defendant OAKWOOD is a place of public accommodation.

Defendant OAKWOOD asserts it is not a place of public accommodation “as to a physician seeking or holding privileges to practice medicine there.” To prevail on that argument the Appellee must establish that the statute expressly provides such an exemption for hospitals or, in the alternative, that the legislature manifestly intended such an exemption based upon the language of the statute.

If the statute's language is clear and unambiguous, then we assume that the legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that **a Court may read nothing into an unambiguous statute** that is not within the manifest intent of the legislature as derived from the words of the statute itself. (Emphasis added).

Roberts v. Mecosta Co. General Hosp., 466 Mich 57, 63, 642 Nw2d 663 (2002)

See also, Ostroth v. Warren Regency, G.P., L.L.C., 474 Mich 36, ___ NW2d ___ (2006).

The language of this statute is unambiguous. There is no express exemption for hospitals with regard to physicians as claimed by the Appellee nor do the words of the statute

support a manifest intention of the legislature to allow the Appellee to be a public accommodation for one person but not for another within the context of this remedial legislation.

The Appellee cited to Samuels v. Rayford, 1995 WL 376939 (DDC April 10, 1995) as support for its position in the Court of Appeals. Samuels is an unpublished district court opinion interpreting a different statute, in a different state. In Samuels the Plaintiff's case arose from a decision of the employer not to re-appoint her to the medical staff. The Plaintiff sued alleging five counts: racial discrimination in making a contract; racial discrimination in employment; procedural due process under the by-laws; violation of a licensure act; and defamation. The language of that case, arose from specific language in the District of Columbia Statute regarding places of public accommodation which is not contained in the ELCRA.

The DCHRA expressly defines a 'place of public accommodation' to mean 'all places included in the meaning of' a laundry list of terms that includes 'hospitals.' ... ***The definition, however, further states that a 'place of public accommodation shall not include any... place of accommodation which is in its nature distinctly private.'*** (Internal cites omitted). (emphasis added). Samuels, supra at pp. 5-6; D.C. Code Ann. § 1-2502(24)

The Samuels case was an employment/contract discrimination case that happened to involve a doctor and a hospital; it was not a public accommodation case where the issue was denial of full and equal enjoyment of privileges and facilities as is the case here. The statute involved in Samuels differs significantly from the ELCRA; the holding there, as to places of public accommodation, was based on language not present in the statute involved in this case. Contrary to Appellee's assertion, the reasoning in Samuels does not apply to this case. No other cases cite Samuels, as precedent on this issue.

In its Court of Appeals brief, Appellee also cited to Bauer v. Muscular Dystrophy Ass'n, 268 F Supp 2d 1281 (D Kan 2003), another non-Michigan district court case that stands alone. Bauer involves an employment dispute. The dispute arose from a refusal by the Muscular Dystrophy Association to hire prospective camp volunteers who had muscular dystrophy. The Plaintiffs brought their suit under Title III of the ADA. The Court repeatedly stated that the case was an employment case which should fall under Title I (Employment). 268 F.Supp.2d at 1290-91. Ultimately, the Court found the language of Title III “ambiguous” and then construed the statute “consistent with “the historical understanding of public accommodation laws.” Id., at 1292. The language of Elliott-Larsen is not ambiguous and further construction is not permitted; Elliott-Larsen must be construed as written.

Appellee cited Watkins v. Hutzel Hospital, 1999WL 33445185 (Mich. App. 1999), another unpublished case in its Court of Appeal’s brief; however, Watkins was not an accommodations case at all, but rather an employment case and the Court analyzed it as such. There was no analysis of the public accommodations statute under either MHCRA or ELCRA. The Court said, “**We therefore analyze this case under the employment provision of the MHCRA.** (Internal cites omitted; emphasis added). (Defendants-Appellees’ Exhibit 6, Watkins, p.1, Fn 1).

The reason that Watkins is not relevant here is that the Watkins Plaintiff was denied staff privileges and sought through her lawsuit to gain employment. The Plaintiff in the instant case is not seeking to gain employment or staff privileges; he already has both. The Plaintiff here claims he was denied the “full and equal enjoyment” of those privileges because of the Defendants’ racial discrimination.

The Appellee's cited authorities are neither binding nor instructive on the issue before this Court. This Court must construe the public accommodation section under ELCRA using the rules of statutory construction and based upon the facts of this case.

E. THERE ARE NO EXCEPTIONS OR EXEMPTIONS THAT ALLOW DEFENDANT OAKWOOD TO RESTRICT ITS DUTIES UNDER THE STATUTE TO CLIENTS PATRONS AND CUSTOMERS OF THE HOSPITAL'S SERVICES.

Having established that the Defendant hospital is a place of public accommodation under §301 and that there are no exceptions or exemptions regarding hospitals, the Court should next look to the language of §302(a) which identifies the Article's prohibited conduct. MCL 37.2302(a) states:

Public Accommodations; Prohibited practices

Except where permitted by law, *a person shall not*:

- (a) ***Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations*** of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status. (Emphasis added).

MCL 37.2301 does not provide a definition for "person." For purposes of the Act, the definition of "person" is found in MCL 37.2103(g).

Section 103 Definitions:

As used in this **act**:

- (g) ***"Person" means an individual***, agent, association, ***corporation***, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency of the state, ***or any other legal or commercial entity***. (Emphasis added).

The CRA definition of "person" is extremely broad, inclusive, far reaching and covers virtually every conceivable entity. This seems to be evidence of the legislature's intent to

be broadly inclusive with respect to who is subject to the prohibitions stated in the statute.

This Court relied upon that very analysis in deciding the Elezovic case. The Elezovic Plaintiff, an employee, brought employment discrimination claims against her employer and supervisors. The Court, relying on the rules of statutory construction, held that the language of the statute allowed for individual liability of supervisors. Elezovic, supra. at 420.

MCL 37.2302 provides that a “person” shall not deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

Clearly the Defendant hospital is a person for purposes of MCL 37.2302 and clearly the Plaintiff is an individual. Although “individual” is not defined in the statute, its plain and ordinary meaning would include the Plaintiff.

To determine the intent of the legislature, the Court must first review the language of the statute itself. Dodak, House Speaker v. State Admin. Bd., 441 Mich. 547, 567, 495 N.W.2d 539 (1993). If the statute is unambiguous on its face, the legislature is presumed to have intended the meaning plainly expressed and further judicial interpretation is not permitted. Lorencz v. Ford Motor Co., 439 Mich. 370, 376, 483 N.W.2d 844 (1992); Ostroth, supra. There is no ambiguity as to whether the Defendant hospital is subject to Article 3.

The Appellee has conceded that MCL 37.2302 applies generally but claims it is restricted only to “patients seeking medical care.” In order for the Appellee’s argument to prevail, the Appellee must either show legislative intent based upon the language of the

statute, or show that the statute contains an exception that allows it to discriminate against all persons other than “patients seeking medical care.” Based upon the clear and expansive definitions used in the statute and the lack of any exceptions that support the Appellee’s argument, the Court should enforce the statute “as written.” A Court is not permitted to read anything “into an unambiguous statute that is not within the manifest intent of the legislature ***as derived from the words of the statute itself.***” (Emphasis added). Roberts v. Mecosta Co. General Hosp., 466 Mich 57, 63, 642 NW2d 663 (2002); Ostroth, *supra*.

"Only where the statutory language is ambiguous may a Court properly go beyond the words of the statute to ascertain legislative intent." Sun Valley Foods Co. v. Ward, 460 Mich. 230, 236, 596 N.W.2d 119 (1999). An ambiguity of statutory language does not exist merely because a reviewing Court questions whether the Legislature intended the consequences of the language under review. An ambiguity can be found only where the language of a statute, as used in its particular context, has more than one common and accepted meaning. Frame v. Nehls, 452 Mich. 171, 176, 550 N.W.2d 739 (1996).

The common ordinary meanings of the relevant terms of MCL 37.2302 do not support the Appellee’s argument. The plain and ordinary meaning of the relevant terms “deny,” “full and equal enjoyment of,” “goods, services, facilities, privileges, advantages, or accommodations,” “because of” and “race,” present no apparent ambiguity.⁵

⁵ “Deny”: refuse to grant; to restrain from gratification of desires. “Full”: lacking restraint, check or qualification; enjoying all authorized rights and privileges. “Equal”: like in quality, nature, or status; like for each member of a group, class or society. Source: Webster’s Dictionary, Merrian Webster, Inc. Copyright 1996.

The Appellee argued to the Court of Appeals that the goods and services, etc., that are subject to §302 are only those provided to clients, patrons or customers. While such a construction might aid the Appellee's argument, it is not supportable based upon the plain language of the statute unless those plain words are tortured beyond recognition. To restrict the Appellee's duty not to discriminate, or alternatively to limit the statute's protection from discrimination, to those seeking medical care, requires language not found in the statute. There is no way to legitimately read such an exclusion or limitation into the language of this unambiguous statute. The Court must assume that the legislature intended its plain meaning and intended the statute to be enforced as written. Milton v. Campbell 474 Mich 21, 706 NW2d 420 (2005).

The Civil Rights Act is remedial in nature and must be liberally construed to provide a broad remedy to prohibit discrimination. Holmes v. Haughton Elevator Co., 75 Mich.App. 198, 200, 255 N.W.2d 6 (1977), aff'd 404 Mich. 36, 272 N.W.2d 550 (1978). The legislature probably did not foresee this particular application of the statute, because this application furthers the purpose of the legislation, to broadly prohibit discrimination. The fact that a statute can be applied in situations not expressly anticipated by the legislature does not demonstrate ambiguity, it demonstrates breadth. Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 215, 118 S.Ct. 1952, 1956 (1998). (Appendix, p. 92A ff, Exhibit 1)

A special panel specifically rejected the claim that protection under Elliott-Larsen only extended to the general public, and to entities serving the general public. Doe and Neal v. Department of Corrections, 232 Mich App 730, 592 NW2d 370 (1998), vacated and cited with approval, Doe v. Department of Corrections, 240 Mich App 199, 611 NW2d 1 (2000).

The Neal Plaintiffs were women prisoners in the Michigan Department of Corrections. They alleged sexual harassment by various guards at Michigan Correctional facilities. In particular, the women Plaintiffs alleged:

that women prisoners are routinely subjected to offensive sex-based sexual harassment, offensive touching, and requests for sexual acts by male officers; and that there is a pattern of male officers requesting sexual acts from women prisoners as a condition of retaining good time credits, work details, and educational and rehabilitative program opportunities. . . Plaintiffs claimed that these actions, and Defendants' failure to protect female inmates from this misconduct through adequate training, supervision, investigation, or discipline of MDOC employees, constituted gender-based discriminatory conduct, sexual harassment, and retaliation in violation of the Civil Rights Act.

Neal, *supra*. at 372

The Appellee's argument here mirrors the dissent in Neal which said that the prison was not providing public services to Plaintiffs and thus CRA did not cover their claims. Because the Plaintiffs were prisoners, not the general public, the dissent held that CRA would not cover discrimination against them. The majority in Neal and Doe held that no exclusions in CRA precluded coverage, even in such a non-public area as a prison. That is the Appellant's position here.

A public accommodation cannot discriminate against individuals solely because they are female, or black, or Jewish, without violating CRA.

The legislative purpose of the CRA is well documented. The Michigan Constitution granted the state legislature the right to implement through legislation the equal protection clause of the Declaration of Rights:

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Mich. Const., Art 1 § 2.

Under CRA, freedom from discrimination in public accommodations and services because of a person's sex (or race) is a civil right. Chambers v. Trettco, 463 Mich 297, 614 NW2d 910 (2000); Corley v. Detroit Board of Education, 632 NW2d 147, 246 Mich App 15 (2001).

CRA implemented the equal protection clause's constitutional protection and extended its coverage to "age, sex or marital status." Neal v. Department of Corrections, 232 Mich App 730, 592 NW2d 370 (1998), vacated and cited with approval, Doe v. Department of Corrections, 240 Mich App 199, 611 NW2d 1 (2000); Department of Civil Rights v. Waterford Twp. Dept., 425 Mich 173, 387 NW2d 821 (1986):

It is clear, however, that [MCL 37.2]302(a) does extend to equality in "goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation" and not just "equal protection of the laws" or "the enjoyment of his civil or political rights"; and that the constitutional classification of "religion, race, color or national origin" has been enlarged in the statute with the addition of "age, sex or marital status."

Department of Civil Rights v. Waterford Twp. Dept., 425 Mich 173, 387 NW2d 821 at 827(1986).

The CRA was also intended to "centralize and make uniform the patchwork of then-existing civil rights statutes applying to the private sector." Neal v. Department of Corrections, 232 Mich App 730, 592 NW2d 370 (1998), vacated and cited with approval, Doe v. Department of Corrections, 240 Mich App 199, 611 NW2d 1 (2000); Department of Civil Rights v. Waterford Twp. Dept., 425 Mich 173, 387 NW2d 821 (1986).

In addition to these consistent Michigan appellate Court decisions, courts have repeatedly held that the CRA is a "remedial statute" of "manifest breadth and comprehensive nature." Eide v. Kelsey-Hayes, 431 Mich 26, 36; 427 NW2d 488 (1988); Corley v. Detroit Board of Education, 246 Mich App 15, 632 NW2d 147 (2001); Neal v.

Department of Corrections, 232 Mich App 730, 592 NW2d 370 (1998), vacated and cited with approval, Doe v. Department of Corrections, 240 Mich App 199, 611 NW2d 1 (2000); Department of Civil Rights v. Waterford Twp. Dept., 425 Mich 173, 387 NW2d 821 (1986).

“[R]emedial statutes are to be liberally construed to suppress the evil and advance the remedy.” Eide v. Kelsey-Hayes, 431 Mich 26, 34; 427 NW2d 488 (1988); Department of Civil Rights v. Waterford Twp. Dept., 425 Mich 173, 387 NW2d 821 (1986); Corley v. Detroit Board of Education, 246 Mich App 15, 632 NW2d 147 (2001); Neal v. Department of Corrections, 232 Mich App 730, 592 NW2d 370 (1998), vacated and cited with approval, Doe v. Department of Corrections, 240 Mich App 199, 611 NW2d 1 (2000); Reed v. Michigan Metro Girl Scout Council, 201 Mich App 10, 15; 506 NW2d 231 (1993).

F. THE DEFENDANT DELIBERATELY MIS -CHARACTERIZED THE TRIAL COURT’S RULING TO CREATE THE APPEARANCE OF ERROR.

In the Court of Appeals, the Appellee argued that the Trial Court based its “results driven” decision to acknowledge a cause of action under the Public Accommodations Section because the Plaintiff could not bring an action under the Employment Section. The Appellee’s implication is that the Court was trying to create a cause of action for the Plaintiff. Not only is this argument inaccurate, it is disrespectful to this Court and to the Trial Court.

In its opinion and order denying reconsideration, the Trial Court merely responded to the Defendant’s misrepresentation of the holdings and effects of Watkins v. Hutzel Hospital, No. 205370 (Mich. Ct. App. May 4, 1999) and Jager, supra, based upon the current state of the law.

The Appellee argued and cited several cases to support its position that a physician seeking staff privileges is not an employee and therefore cannot bring an employment

claim under MCL 37.2201, et.seq. The trial Court pointed out that the Watkins court, on the facts before it, specified that the Plaintiff was an employee and found that Plaintiff's action related to an "employment decision" and not a public accommodation claim. The trial Court pointed out that Watkins was unpublished, was not binding, and was distinguishable on several other grounds. The trial Court then pointed out that in the present case there was no dispute that the Plaintiff was not an employee and held, "We therefore cannot apply provisions of Elliott-Larsen addressing employment discrimination." Id.

The Appellee argued in the Trial Court that by allowing the Plaintiff to bring an action under the Public Accommodation Section, the rationale of Jager is undercut. The trial Court disagreed, pointing out that the decision in Jager relied upon the text of the act, specifically the definition of "employer" and that since the Plaintiff was not an employee of the Defendant, "We hardly contradict Jager." Id. These rulings by the Trial Court were correct.

This Court has subsequently overruled the specific holdings of Jager on which Defendant relied in the lower Courts. See. Elezovic, supra.

This precise issue was raised in Menkowitz v. Pottstown Memorial Medical Center, 154 F 3d. 113, 121 (3d Cir. 1998). (Appendix, p. 99A, Exhibit 2) In Menkowitz, a physician whose hospital privileges were suspended sued under Title III of the Americans with Disabilities Act. The trial Court dismissed for failure to state a claim opining that the Plaintiff there did not come within the Act because he was not a "guest, client or customer seeking the services of a place of public accommodation." Id. The Third Circuit reversed. The rationale of the circuit court speaks directly to the issue here.

Under the language of Title III, its legislative history, and the principles announced in Ford, we must conclude that the appellant has properly stated a cause of action as an "individual" discriminated against in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." At the outset, we cannot accept the district court's blanket interpretation that Congress intended Title III to apply only to members of the "public," which the district court defined as those guests, clients, or customers who seek the services, facilities, or privileges offered by a place of public accommodation. The operative rule announced in Title III speaks not in terms of "guests," "patrons," "clients," "customers," or "members of the public," but instead broadly uses the word "individuals."

154 F.3d at 121. The CRA likewise uses the term "individuals" in describing those who are within the protection of the Act. MCL 37.2302(a).

The Defendant hospital in Menkowitz, as does this Defendant hospital, raised the issue that the Plaintiff's claims should be brought under the Act's employment provisions.

In response to that argument the Menkowitz court held,

We do agree with the hospital, however, that Title III was not intended to govern disability discrimination in the context of employment. But the appellant in this case never alleged that he is an employee of the hospital or that he was denied the benefits associated with employment. (Internal citations omitted).

Id. The Plaintiff here agrees that this section of the CRA does not apply to the employment context but it is undisputed that the Plaintiff here is not an employee and he has not brought any claim implicating "terms or conditions of employment." The Menkowitz court further held:

Nor can we agree with the hospital's argument that Title III offers no protection against disability discrimination by virtue of the appellant's "unique business relationship" with the hospital. This contention runs contrary to the plain language and legislative history of Title III which in no way mentions any sort of "business relationship" that would preclude an "individual" from asserting a cause of action if denied the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."

Id.

The rationale of Menkowitz is an appropriate model for statutory construction and analysis in this case.

G. THE PROHIBITION OF JUDICIAL REVIEW OF A HOSPITAL'S STAFFING DECISIONS IS NOT AN ISSUE.

The Appellee has asserted below that “the Trial Court’s errors in this case are made far more serious given that its decision allows a physician to challenge at trial a private hospital’s staffing decisions.” The Appellee stated the general rule that the Courts may not interfere with the staffing decisions of a private hospital and then cited to six cases for support of the rule. Nowhere in the argument does the Appellee candidly inform this tribunal that the general rule “is limited to disputes that are contractual in nature” and that Michigan Courts have “declined to articulate a broad principal that a private hospital’s staffing decisions may *never* be judicially reviewed.” (Emphasis in original). Long v. Chelsea Community Hospital, 219 Mich App 578, 586, 557 NW2d 157 (1997). See also Samuel v. Herrick Memorial Hospital, 201 F.3d. 830 (6th Cir. 2000) (Appendix, p. 115A, Exhibit 3); Sarin v. Samaritan Health Center, 176 Mich App 790, 795, 440 NW2d 80 (1989).

The Appellee begrudgingly admitted that an exception to the non-reviewability doctrine does exist for discrimination claims under state or federal law. Long, supra. The Plaintiff’s claims here at issue were brought under this state’s CRA based upon discrimination and therefore, they fall squarely within an acknowledged exception to the non-reviewability doctrine.

H. THE APPELLEE 'S CHALLENGE TO THE FACTUAL BASIS OF THE COMPLAINT IS NOT PROPERLY BEFORE THIS COURT .

The Appellee brought this motion in the trial court on grounds that the Plaintiff failed to state a claim upon which relief could be granted and a statute of limitations defense under (C)(7). The Plaintiff submitted affidavits in opposition to the (C)(7) argument as permitted by the court rules. MCR 2.116(G)(2). The Trial Court decided the motion under MCR 2.116(C)(8). The Appellee did not appeal on C(10) grounds in the Court of Appeals but then claimed necessity to brief a challenge to the factual basis of plaintiff's claims because of the Trial Court's ruling.

This issue is not properly before this Court. A factual challenge was not argued in the Trial Court and the record on appeal does not contain the proofs that both parties need (and actually possess) for this Court to properly decide that issue. A party may not enlarge the record on appeal. People v. Eccles, 2004 WL 94706 (Mich App,2004). In the Trial Court the Appellee's motion claimed a statute of limitations defense. The Plaintiff submitted affidavits, previously obtained, that refuted the time of certain events as claimed by the Defendant's pleadings. Such affidavits are permissible and do not convert a (C)(7) motion into a (C)(10) motion either in the Trial Court or on appeal.

I. THE DEFENDANT HAS WAIVED THE CONSPIRACY ISSUE

The Appellee has not briefed or argued a challenge regarding the sufficiency of the Plaintiff's conspiracy claim and it is therefore considered abandoned. Flint City Council v. State of Michigan, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002), citing Davenport v Grosse Pointe Farms Bd of Zoning Appeals, 210 Mich App 400, 405; 534 NW2d 143 (1995).

J. POLICY CONSIDERATIONS

The CRA is a remedial statute written to implement the equal protection clause of the states constitution and to centralize and make uniform the patchwork of then-existing civil rights statutes applying to the private sector. Neal, supra.

It is a “remedial statute” of “manifest breadth and comprehensive nature.” Eide, supra; Corley, supra; Neal, supra. The Appellee’s position would have this Court to narrowly construe this remedial statute and restrict its “manifest” breadth such that the fewest possible citizens would fall under its’ protections against discrimination. The Plaintiff moves this Court to liberally construe this remedial statute to “suppress the evil and advance the remedy” provided by the statute.

III. CONCLUSION

Defendant OAKWOOD is a place of public accommodation as to all persons and it may not lawfully discriminate against any of them. Where employees of places of public accommodation seek remedies for discrimination regarding their terms and conditions of employment under the act, such claims, if they lie at all, must be brought under the employment section; however, where discrimination deprives an "individual" the full and equal enjoyment of such place based upon race, the public accommodation statute is the proper and legislatively intended vehicle.

The clear and unambiguous language of the statute expresses the legislative intent to provide equal protection of the law to all citizens of this state in keeping with the state's constitution. To cull out large segments of the population and to remove them from the equal protection of the laws prohibiting discrimination based upon gender, race, age, national origin and marital status is antithetical to the stated purpose of the constitution and the legislative enactments written to enforce it.

IV RELIEF REQUESTED

The Plaintiff-Appellant requests that this Court affirm the Trial Court's denial of summary disposition and remand this case for trial or further proceedings consistent with that order.

Respectfully submitted,



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Dated: March 20, 2006